

REVIEWS

The Re-Vision of Rape Law

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Real Rape: How the Legal System Victimizes Women Who Say No.
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I. TWO PICTURES OF RAPE LAW

Does the law take the crime of rape seriously? As is often the case in legal matters, one can marshal arguments and evidence on both sides of the issue. One can make a case that the legal system considers rape a horrible crime and punishes it severely. Or one can show that the legal system regards charges of rape as trivial or unreliable, and dismisses them.

Anglo-American law has long considered rape a heinous offense.¹ Convictions for rape often have brought the most severe sentences the law can impose. Throughout the history of American punishment, the death penalty has been carried out more often for rape than for any other crime except murder.² Even now, when the death penalty for rape is unconstitutional,³ life imprisonment for rape still is held out as the maximum sentence in a number of jurisdictions.⁴ And those who have argued in favor of reduced sentences for the offense of rape often have done so because they

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¹ Before the Norman Conquest of 1066, the penalty in England for rape was death and dismemberment. Susan Brownmiller, *Against Our Will: Men, Women and Rape* 24 (1975).

² U.S. Bureau of Commerce, *1 Historical Statistics of the U.S.: Colonial Times to 1970* at 422 (1975).

³ *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977).

⁴ See Leigh Bienen, *Rape IV*, 6 *Women's Rts. L. Rep.* 1 (Supp. Summer 1980).

believe that convictions will be made *more* likely as a result,⁵ hardly the goal of those who want to minimize the seriousness of rape.

A study of rape victims in Boston revealed that the police, not among those generally expected to take rape cases seriously, thought rape was a terrible crime indeed.⁶ In fact, a number of women report sensitive police (particularly where policewomen are routinely called on rape cases), sympathetic prosecutors, and a supportive legal system. In a study I worked on with Pauline Bart, ninety-four women who were raped or attacked and avoided being raped were asked about their experiences. Some women indicated that police were very helpful, going so far as to help board up broken down doors or to tell the victim that she had a right to walk around unmolested. Some police clearly sympathized with the victims and were gentle in their questioning. Some of the women reported helpful prosecutors and a generally nonabusive legal system.⁷

On this evidence, rape seems a grave matter in the criminal law. But anyone who has even glanced at the explosion of literature on the subject in the last fifteen years knows that this is hardly an uncontested view.⁸

In many cases, the legal system never has a chance to deal with rape because many victims fail to report their attacks. Only slightly over half of all rapes and rape attempts by strangers are reported to the police in the first place,⁹ and those figures only count the discrepancies between rapes that women report to the police and those that women report to survey interviewers. Rapes reported to neither simply aren't included in the figures. The reporting rate for rapes involving acquaintances is harder to calculate because such rapes often are the ones not reported to anyone. Nevertheless, estimates of the reporting rate vary from 5 to nearly 50 percent, leaving most acquaintance rapes by any account unreported.¹⁰

⁵ Leigh Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 *Women's Rts. L. Rep.* 170, 179-80 (1980).

⁶ Linda Lytle Holmstrom and Ann Wolbert Burgess, *The Victim of Rape: Institutional Reactions* 44-46 (1978).

⁷ Other findings from this study are reported in Kim Lane Scheppele and Pauline B. Bart, *Through Women's Eyes: Defining Danger in the Wake of Sexual Assault*, 39 *J. Soc. Issues* 63 (No. 2 1983), and in Pauline B. Bart and Patricia O'Brien, *Stopping Rape* (1986).

⁸ The explosion of feminist scholarship in this area began with Brownmiller, *Against Our Will* (cited in note 1).

⁹ J. McDermott, *Rape Victimization in 26 American Cities* 43-48 (1979).

¹⁰ Menachem Amir, *Patterns in Forcible Rape* 27-28 (1971); Brownmiller, *Against Our*

Once rapes are reported to the police, a great many complaints are treated as unfounded, dropped for a whole host of reasons from the inappropriateness of the jurisdiction to the police not believing the woman's story. Unfounding rates vary widely, with the national average being around 10 percent.¹¹ These rates, like the initial reports themselves, vary with the type of relationship between victim and accused rapist. While less than 5 percent of New York's rape complaints involving strangers were unfounded, 24 percent of the nonstranger cases were found to be without merit for prosecution.¹²

Even if a rape is reported and a complaint founded, the arrest statistics in rape cases show that many rapists, particularly those who did not know their victims, are never apprehended. Washington, D.C. reported an arrest rate of about 50 percent for all founded cases.¹³ Michigan statistics reveal a fairly steady arrest rate of between 40 and 50 percent.¹⁴ The national figures for 1983 reveal a national "clearance by arrest" rate of 52 percent for rape.¹⁵

At the next stage, decisions to prosecute, there is yet another attrition of cases. Data from Washington, D.C. indicate that 26 percent of rape cases are not prosecuted once an arrest is made. The cases are simply dropped.¹⁶ In one county in Texas, prosecutors dropped 42 percent of all cases involving strangers, about 70 percent of cases involving acquaintances, and about 50 percent involving friends.¹⁷ Even when arrests are made, prosecution does not proceed in a significant number of cases.

If an alleged rapist is caught and the crime prosecuted, he is

Will at 190 (cited in note 1); Diana E. H. Russell, *Sexual Exploitation* 33-37 (1984).

¹¹ Thomas W. McCahill, Linda G. Meyer, and Arthur M. Fischman, *The Aftermath of Rape* 108 (1979).

¹² Duncan Chappell and Susan Singer, *Rape in New York City: A Study of Material in the Police Files and its Meaning*, in Duncan Chappell, Robley Geis, and Gilbert Geis, eds., *Forcible Rape: The Crime, The Victim and the Offender* 245 (1977).

¹³ Kristen M. Williams, *The Prosecution of Sexual Assaults* 24 (Publication No. 7, PROMISE Research Project, The Instit. for Law & Social Research, Washington, D.C. 1978).

¹⁴ Jeanne C. Marsh, Alison Geist, and Nathan Caplan, *Rape and the Limits of Law Reform* 31 (1982).

¹⁵ U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1985* at 435-37 (1986). It should be noted that this is a higher clearance-by-arrest rate than for any other major crime except murder (76 percent) or aggravated assault (61 percent). Robbery (26 percent), burglary (15 percent), and car theft (15 percent) lag far behind rape in the percentage of reports cleared by arrest.

¹⁶ Williams, *The Prosecution of Sexual Assaults* at 26 (cited in note 13).

¹⁷ Robert A. Weninger, *Factors Affecting the Prosecution of Rape: A Case Study of Travis County, Texas*, 64 *Va. L. Rev.* 357, 387 (1978).

not likely to be convicted. In Washington, D.C., the conviction rate, including plea bargains, was 20 percent.¹⁸ The conviction rates in other jurisdictions were higher, from 25 percent in New York City¹⁹ to 34 percent in California.²⁰ Michigan achieved a very high conviction rate of around 70 percent following the passage of a revised rape statute,²¹ but this figure remains higher than other jurisdictions. In Philadelphia, where researchers examined the outcomes of cases noting variables that affected the probability of conviction, the conviction rate varied from zero in cases where there was some victim precipitation and no physical roughness or weapon used by the defendant to about 90 percent where there was no victim precipitation, a weapon was present, and the victim was unmarried.²²

The attrition rate at every level indicates that rape cases do not often conclude with conviction of the rapist. One study, figured from FBI Uniform Crime Reports in 1970, indicated that men who raped had about a 13 percent chance of being convicted, assuming that the victim reported the crime to the police.²³ Another study revealed the chances were closer to 2 percent.²⁴ But rape is not necessarily different from other felonies in this regard because those actually convicted of felonies generally comprise a minority of those charged with them.²⁵ Only murder fails to follow this pattern of attrition.²⁶ But the qualitative evidence about the treat-

¹⁸ Williams, *The Prosecution of Sexual Assaults* at 26. This compares with a 51 percent conviction rate for murder and a 48 percent conviction rate for burglary.

¹⁹ Vera Institute of Justice, *Felony Arrests: Their Prosecution and Disposition in New York City's Courts* 8 (1977).

²⁰ Jim Galvin and Kenneth Polk, *Attrition in Case Processing: Is Rape Unique?*, 20 J. Res. Crime & Delinquency 126 (1983).

²¹ Marsh, Geist, and Caplan, *Rape and the Limits of Law Reform* at 32 (cited in note 14).

²² McCahill, Meyer, and Fischman, *The Aftermath of Rape* at 191 (cited in note 11).

²³ Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 Cal. L. Rev. 919, 927 (1973).

²⁴ National Institute for Law Enforcement and Criminal Justice, *Law Enforcement Assistance Administration, Forcible Rape, Final Project Report* (1978).

²⁵ In one of the most detailed studies of the attrition of felony cases, the Vera Institute estimated that only 15 percent of those arrested for felonies in New York were convicted of a felony charge. Only 2.3 percent of the cases went to trial and those that resulted in convictions overwhelmingly convicted the defendant of a misdemeanor or a lesser felony than charged. The vast majority of cases were either dropped altogether (43 percent) or resulted in guilty pleas (55 percent). Only 5 percent of these guilty pleas were for the felony charged and another 20 percent for lesser felonies. About three quarters of all guilty pleas for felony charges dropped the offense to a misdemeanor. (Figures calculated from table given by Vera Institute of Justice, *Felony Arrests* at 7 (cited in note 19)).

²⁶ *Id.* at 52.

ment of rape victims indicates that there is more going on here than ordinary felony attrition.

Rape victims often perceive that the legal system adds to their injuries; they often tell horror stories about the way they were treated by police, prosecutors, or defense counsel. In my study with Bart, we heard that one woman, raped by someone she knew, called the police and told them her attacker's name and address. Later the police said they could not do anything in the case unless she gave them her rapist's social security number, clearly indicating that the rape wasn't to be taken seriously. In a couple of cases, police brought suspects to the victims' homes or locked suspected rapists in the back seat of the police car with the victim on the way to the station, treating them both like criminals. Victims often reported being upset that their cases were passed on from patrolman to detective to prosecutor, each of whom asked the same questions over and over again (sometimes including questions about, for example, what the victim had been wearing or whether she enjoyed sex and often saying directly that they didn't believe her), making the victims relive the painful experience each time with added humiliation. Some victims got the impression that the police and prosecutors were, in the words of one victim, "just a bunch of people who wanted to hear dirty stories." When a rape case went to trial, which happened infrequently, several victims reported that some judges used Hale's dictum, that rape is a charge easily made and difficult to defend against, in their jury instructions. The painful treatment victims often have to endure to persist in pressing charges makes them feel that they are more on trial than the defendant. A study of rape victims in Boston revealed that a number of victims were challenged by district attorneys almost as if the DAs were defending the rapist. And when a case came to trial, the woman's behavior, not the rapist's, was often the focus.²⁷

We have, then, an interesting tension. On one hand, rape is, on the statute books at least, a serious offense indeed and the regular (if not very frequent) long sentences meted out to rapists indicates that this condemnation is not all talk. And some women feel that the police and prosecutors are on their side in pressing rape charges, taking their cases as seriously as statutes indicate they should be. On the other hand, the high attrition rate coupled with frequently nightmarish experiences of rape victims reveal that it is very unlikely that rapists will get caught and prosecuted and often

²⁷ Holmstrom and Burgess, *The Victim of Rape* at 30-260 (cited in note 6).

true that women will feel their complaints are minimized.

II. REAL RAPE AND SIMPLE RAPE

How can these two very different pictures be reconciled? One answer to this puzzle is to ask whether *both* pictures are true, only in different sorts of cases. Susan Estrich in her book, *Real Rape*, adopts just this strategy. "Real rapes," according to Estrich, have always been treated with grave concern. Real rapes are the ones where the rapist and the victim are strangers or where the rapist uses a great deal of physical force or is armed. If there are multiple rapists or the victim and defendant are of different races (particularly if the victim is white and the defendant is black), these count as real rapes, too (p. 3).²⁸ The stranger who jumps out from a dark alley and, brandishing a knife, ambushes his surprised victim, is a real rapist. And real rapes receive sympathetic attention from police, prosecutors, juries, and judges. Convictions of real rapists are upheld on appeal.

"Simple rapes" (pp. 4-5), by contrast, are the ones that have long been dismissed as trivial in law. Where the rapist knows his victim, acts alone, and doesn't use a weapon or brutally beat her, the legal system often treats the rape as if it weren't a rape at all. These are the cases that police unfound, that prosecutors dismiss as merely "technical" rapes, where juries fail to convict, and that judges overturn on appeal.

Estrich's analysis is sophisticated and subtle. It does much more than provide evidence for and deplore a binary distinction. It captures the worldview within which such a distinction makes sense, demonstrates the power of a whole way of seeing relations between the sexes (particularly as that power is revealed in the outcomes of appellate court decisions), and shows us all how we might see differently. The book proposes to reform rape law by re-visioning it.

The first task in re-visioning is seeing what is there in the first place. Estrich reviews American (and a bit of English) case law to see how the courts have treated cases that have come to them on appeal. She adopts the view forwarded by the Realists (and complicated by the Critical Legal Studies movement) that doctrine does not provide single right answers to legal questions but rather

²⁸ All parenthetical page references are to Susan Estrich, *Real Rape: How the Legal System Victimizes Women Who Say No* (1987). This book is a revision of the article Estrich published, 95 Yale L. J. 1087 (1986), under the title "Rape."

provides a set of resources for argument that can be used in a variety of ways to suit the purposes of the deciding judge (p. 28). Actually, her analysis shows *not* that doctrine in rape cases yields unpredictable results, but rather that a clear, persistent pattern emerges in which real rapes get serious attention and simple rapes do not. Whimsy, the incoherence of liberal political thought, political party identification, or what the judge had for breakfast, do not seem to help us understand what's going on here. Instead, Estrich's impressive analysis reveals the orderly, patterned "situation sense"²⁹ of judges and the deep structure of culturally infused perception at work in legal interpretation—perception that persists even when the statutes judges interpret are reformed.

To capture this perception, Estrich examines the facts that are highlighted in statutes as compared with the facts that are emphasized in opinions. The distinction between real and simple rapes does not appear in statutes, which in traditional form stipulate that "[a] man commits rape when he engages in intercourse (in the old statutes, carnal knowledge) with a woman not his wife; by force or threat of force; against her will and without her consent" (p. 8). These statutes draw attention to the defendant's behavior at the moment of penetration; but Estrich demonstrates that appellate court decisions often emphasize other facts that highlight the behavior of the victim and put the event in the larger context of her life. Did she know the defendant prior to the incident? Was her own behavior morally blameless at the time? Did she fight the defendant off with all her strength? The patterned emphasis of these *other* facts—facts that assess the actions of the victim as those actions are set against the backdrop of her life—reveals the structure of perception embedded in formal law.

In the traditional cases, those brought under the rape statutes before the reform movement of the 1970s and 1980s, this focus on the victim was achieved in part through use of the resistance test. Courts, Estrich demonstrates, used resistance of the victim as an indicator of the nonconsent that the rape statutes required (pp. 29-41). They presumed consent unless the victim could demonstrate that she battled and struggled and fought (and the victim was more convincing if she fought to the point of injuring herself). In the absence of this evidence, rape convictions were much harder to get.

That is, they were much harder to get unless the rapes were

²⁹ The term is from Karl Nickerson Llewellyn, *The Common Law Tradition: Deciding Appeals* 121 (1960).

real rapes. Estrich shows that convictions of men who were strangers to the victim, who acted in concert with others, who were armed, or who were black with white victims, were rarely reversed for lack of resistance of the victim—even when the victim exercised exactly the degree of resistance that caused courts in simple rape cases to conclude that the victim had not sufficiently demonstrated her nonconsent. The resistance test separated simple rapes from real rapes.

And the same was true of the various evidentiary rules that embodied distrust of women. The corroboration requirement, unique to rape cases, operated to throw out most cases of simple rape where the testimony of the victim was thought to be “inherently incredible” (p. 44). But here, too, one rarely found convictions reversed for lack of corroboration where a real rape was at issue. Similarly, the introduction of evidence of the victim’s prior sexual history was allowed and was often influential in rape cases, but primarily where the rape involved acquaintances and where the defendant might know of the woman’s sexual reputation. Convictions arising out of violent rapes or gang rapes were rarely reversed even when the victim had an active sexual past (pp. 47-53).

The rape law reform movement of the 1970s and 1980s was supposed to end the second-class treatment of the victims of rape. State after state enacted new rape statutes, many designed to refocus attention on the defendant and away from the victim (pp. 57-79).³⁰ Many of these new statutes eliminated the resistance test and the special evidentiary rules traditionally used in rape cases because these requirements treated women unfairly.

Estrich examines the case law in the wake of legal reform. The rape reform movement may have succeeded in changing the statutes, but as Estrich writes, “[t]he problem has never been so much the terms of the statutes as our understanding of them” (p. 90). She notes that the old requirements of utmost resistance of the woman (combined with her chastity and general blamelessness) have given way to a new statutorily mandated emphasis on the force used by the rapist (pp. 58-71). This would seem to produce the sort of shift of focus (off the victim and onto the defendant) for which feminist law reformers were striving, but in fact the courts have not interpreted the new statutes this way. Instead, Estrich argues, the concern with force has itself become yet another screen separating real rapes from simple rapes.

³⁰ See also Marsh, Geist, and Caplan, *Rape and the Limits of Law Reform* at 1-23 (cited in note 14).

Force, as courts have come to interpret it, is defined by "‘boy’s rules’ applied to a boy’s fight" (p. 60). Force becomes *physical* force, the sort of punching, kicking, brawling violence that is required to get a conventionally socialized man to do something against his will. But women are socialized differently; in particular, they often see "force" as involving much more subtle cues. Women may see force in a man’s intimidating posture or veiled threat, and they may sensibly compare risks of getting hurt with the chances of escaping someone bigger and stronger. In other words, a woman may feel the threat of force before any knives are drawn or punches thrown. And she may give in to that force, engaging in sex against her will, before she has established to the satisfaction of a court of law that she has "really" not consented. By limiting the force requirement to physical violence, and particularly physical violence at the moment of sexual assault, legal doctrine omits much of what women perceive as coercion.

Especially in the case of simple rapes, the substitution of a standard of physical force for coercion leaves a raped woman, who has no doubt that she has been forced to have sex against her will, without voice at law. The woman who says "no" and is ignored finds that her voice alone was not enough to stop the rapist; and once the rape has occurred her voice alone is not enough to establish a crime has happened. To demonstrate force, it is not enough to cry or plead with a rapist; it is not enough to say "no" forcefully and frequently. The rape victim who would be heard by the courts "is one who does not scare easily, one who does not feel vulnerable, one who is not passive, one who fights back, not cries. The reasonable woman, it seems, is not a schoolboy ‘sissy’; she is a real man" (p. 68). And a real man, threatened with an assault on his body or his will, fights back with physical force. In the absence of such physical force, a woman is held by courts to have consented to sex, at least when attacked by an acquaintance. When a woman is ambushed by a stranger, the fact of penetration is generally enough to establish that sufficient force was used.

Estrich thus discovers that while the wording of rape statutes has changed, sometimes rather dramatically, and while the number of convictions reversed on appeal has declined, the courts even now demonstrate distrust of women who claim rape. And courts reveal that distrust especially in cases of simple rape. Whatever the legal test seems to require, the real test is whether the woman put herself in what looks in retrospect like a compromising situation. Once that happens, the law seems to indicate, she’s on her own. Rape, all along, was a heinous offense, when it was deemed to have hap-

pened. It's just that it was deemed to have happened in many fewer cases than the victims experienced. And the courts still consistently interpret the factual patterns of simple rapes so as not to count them as rapes at all. What produces this consistent pattern of interpretation across many different kinds of rape cases?

III. PERCEPTUAL FAULT LINES

Law cannot live by doctrine alone. Judges tell litigants and officials what they should do in particular cases. To do this, judges must do more than interpret the law. They must also interpret the facts. Estrich reveals that when judges interpret facts in rape cases, they demonstrate an impressive consistency in sorting out the things that matter: the facts that distinguish simple rapes from real rapes are ever-present in court decisions even when the statutes do not stress those facts. In this section, I will explore the more general process of the interpretation of facts and discuss the special problems that rape law presents.

A. The Social Construction of Facts

Judges must *apply* law to facts, interpreting facts and rules *together*.³¹ The facts must be made ready for the application of law just as the law must be made intelligible in light of particular facts. Legal interpretation is not only performed with legal texts (like statutes or constitutional clauses); it is also performed with the seemingly simple statements of what happened. Statements of fact are just as much constructions of law as are statements of doctrine.

This is not to say that judges lie or that they twist the truth to fit their prejudices. If lying is the forwarding of "self-disbelieved statements,"³² then this is certainly not what judges do in normal practice. But that does not mean that the version of facts that courts find to be true in particular cases is the right or best or only truth. The idea of truth is not that simple. There are multiple "true" descriptions that are not identical with or translatable into each other. Many different versions of a story all may correspond with reality, just with different parts of it, rather like the blind men with the elephant. The goal of law thus cannot be to find the truth, the whole truth, and nothing but the truth. If such an enter-

³¹ For an elaboration of this view, see Kim Lane Scheppele, *The Mutual Construction of Facts and Rules*, in *Legal Secrets: Equality and Efficiency in the Common Law* (forthcoming 1988, University of Chicago Press).

³² The term is from Erving Goffman, *Strategic Interaction* 9 (1969).

prise were possible, it would certainly be largely irrelevant. As Nelson Goodman points out:

"The truth, the whole truth and nothing but the truth" would . . . be a perverse and paralyzing policy. . . . The whole truth would be too much: it is too vast, variable and clogged with trivia. The truth alone would be too little, for some right versions are not true—being either false or neither true nor false—and even for true versions rightness may matter more.³³

The interesting question, then, becomes not whether a particular description of facts is true or false,³⁴ but rather whether a particular description is the best description among available alternatives.

This may be puzzling. An example from Estrich's book might help. In one of the cases Estrich discusses, the defendant claimed that he engaged in heavy caressing. The victim experienced light choking.³⁵ As Estrich points out, it may have been that one or the other was lying. But, as she also notes, it may also have been that both descriptions were true because men and women have different perceptions of force. What was heavy caressing to the man may have been the very same action that counted as light choking to the woman (pp. 63-64). Each description may have been self-believed and each description may have reasonably corresponded to some event in the world, both commonsense standards of what makes for truth. But the different descriptions have different legal consequences when the relevant standard in rape law is the force applied by the defendant to the victim: "light choking" implies a degree of force absent in "heavy caressing," and choking of any sort may convince a court that a woman was forced to have sex against her will. Thus, the description that the court holds to be "really true" matters a great deal.

How can judges choose among descriptions in a principled way? On this question, the substantial and blossoming jurisprudence of interpretation has surprisingly little to offer.³⁶ And the

³³ Nelson Goodman, *Ways of Worldmaking* 19 (1978).

³⁴ Metaphorical descriptions such as "The earth dances the role of Petrouchka" are compelling, *not* because they are true or false but because they may give us a picture of the world that is useful or coherent or insightful. See *id.* at 109.

³⁵ *State v. Rusk*, 289 Md. 230, 424 A.2d 720, 722 (1981).

³⁶ For example, Ronald Dworkin excludes questions of fact at the outset in his theory of interpretation. Ronald Dworkin, *Law's Empire* 11-12 (1986). In spite of the interpretive stance Dworkin takes toward legal texts, he is surprisingly uninterpretive in considering questions of fact: "If judges disagree over actual, historical events in controversy, we know what they are disagreeing about and what kind of evidence would put the issue to rest if it

work of the legal realists, while often concerned with the importance of facts in the determination of legal disputes, argues either that "facts are guesses"³⁷ (implying there is little that can be systematically said about them) or that the facts that are relevant are similar to those taken by past courts to be relevant³⁸ (implying that the ideas of relevance and similarity themselves have settled and helpful meanings).³⁹

Most often the problem of interpreting facts is taken in legal practice to be a matter of separating truth from falsehood, and many of the rules of evidence can be seen as attempts to weed out unreliable (probably false) facts. But the construction of a statement of facts is not, even in ideal form, the determination of a single truth, even though the exclusion of lies from legal testimony and the effort to get the most reliable evidence possible are both important. Those who construct descriptions of fact are engaged in a creative enterprise that, like other creative enterprises, operates within constraints provided both by the genre and by the standards of evaluation worked out in the discourse of criticism.

We might get some preliminary sense for the genre of legal fact making and the critical standards that currently cover it by looking at what courts, in fact, do. In the paradigmatic (but infrequent) case of trial by jury, the division of labor between judge and jury is premised on a problematic distinction between questions of law and questions of fact.⁴⁰ A jury resolves questions of fact, using its own standards about which version of reality to adopt. But, it does not have to explain what version of reality it adopted nor why

were available." *Id.* at 3. His discussion of the interpretation of the social practice of courtesy, however, indicates that he is more deeply aware of such interpretive problems than his other statements suggest. The interpretation of what courtesy is and what it requires involves deep understandings of a society's culture and history, both of which are themselves matters of some important disagreement and debate. *Id.* at 47-55, 62-73. Also, Michael Moore recognizes that "the judge must have some theory about facts that determines which of the indefinitely large number of descriptions of 'what happened' should be used in deciding the case," but he does not explain what such a theory might be. See *A Natural Law Theory of Interpretation*, 58 *So. Cal. L. Rev.* 277, 283 (1985).

³⁷ Jerome Frank, *Facts are Guesses, in Courts on Trial* 14 (1949).

³⁸ Karl Nickerson Llewellyn, *The Bramble Bush: Some Lectures on Law and its Study* 47-49 (1930).

³⁹ For a sense of the problematic nature of the idea of relevance, see generally Alfred Schutz, *Reflections on the Problem of Relevance* (1970).

⁴⁰ The difficulty of separating questions of law and fact has now become commonplace in jurisprudence. See, for example, Edward H. Levi, *An Introduction to Legal Reasoning* 1-9 (1949) for a discussion of the way in which statements of law and statements of fact give meaning to each other. See also Herman Oliphant, *Facts, Opinions and Value Judgments*, 10 *Tex. L. Rev.* 127 (1932).

it decided the way it did. The construction of facts a jury accomplishes is left implicit, the standards unstated.

What are we to make of this practice? We might say, first, that the delegation of fact finding to the jury shows that the selection of the best version of a story is to be made against the backdrop of the community's implicit rules for the construction of reality. If this community does not view orders by spirits to be a reasonable motive for a killing, for example, then a version of reality that incorporates such an account is unlikely to be persuasive to a jury in a murder trial. If the version of reality that the defendant urges is removed far enough from ordinary narrative conventions that the account is unintelligible to typical community members, then the defendant may be found to be insane.⁴¹ Even when a judge composes statements of facts as part of her opinion, the statements generally follow more broadly accepted conventions of storytelling.⁴²

Most of the time, the implicit standards for the description of reality work tolerably well. There are large areas of social life where the commonly understood backdrop is so clear that the relevant description of events is obvious. The question "How was your day?" asked by a husband of his wife produces answers that make sense against the backdrop of what they have come to expect from each other. The wife may reasonably answer that the department meeting went well or that she'd finished an article she was working on, but she will probably not say to her husband that she passed three red cars in a row in the university parking lot.⁴³ The latter statement would generally be seen as irrelevant in that particular context. Similarly, the instruction to a guard to shoot any of his captives who moved does not mean that the guard should then shoot all the prisoners because they are moving around the earth's axis and around the sun.⁴⁴ Some things, while part of a description of the "whole truth," generally "go without saying." The array of

⁴¹ The sociological literature on mental illness, particularly labeling theory, often defines mental illness in terms of deviations from community practice rather than in terms of disease or some other fixed standard. See generally, e.g., Thomas J. Scheff, ed., *Labeling Madness* (1975).

⁴² The major exception to this general correspondence between legal storytelling and commonsense description is the legal fiction. See Lon Fuller, *Legal Fictions* (1967); V. K. Varadachari, *Legal Fictions* (1979); Pierre J. J. Olivier, *Legal Fictions in Practice and Legal Science* (1975); C. K. Ogden, *Bentham's Theory of Fictions* (1932); Hans Vaihinger, *The Philosophy of "As If"* (1924). I am in the process of writing a book about legal fictions.

⁴³ See Gaye Tuchman, *Making News* 6-8 (1978), for a version of this example and a discussion of it.

⁴⁴ Goodman, *Ways of Worldmaking* at 121 (cited in note 33).

things that *could* be said as part of a description is so large that we must have some way of sorting through the huge morass of detail. And those standards are part of the things that one learns growing up as a conventionally socialized member of a culture.

In fact, an account, a story, a version of "what happened" only makes sense against a background that limits the range of things that might be said. To describe the whole truth is impossible; to describe a coherent partial truth means having some background standards for deciding what is relevant and what is not. And judgments of relevance are necessarily local. They depend on things like the social context and the purposes for which the description will be used. What is surprising is how much of social life proceeds with standards for description being implicit, but well-understood, highly complex, but used in practice by a great many social actors.⁴⁵

B. Social Earthquakes

Agreement over what is true and what has happened does not extend to all areas of social life, however. Perceptual fault lines run through social life in locations where the competing visions of differently socialized groups come into contact, and, when the pressure is great enough, eventually force the perceptions of one group or the other to buckle. Although they may coexist for a long time without serious conflicts, radically different perceptions create the potential for devastating social earthquakes. The pressures of lawsuits, out of which one version or another emerges victorious, make such disasters more likely. And two of those areas where radically different perceptions exist in uneasy tension are in sexual relations between men and women generally and cases of rape specifically.

This is not to say that rape is simply a matter of variable perception. It isn't. The woman who has been attacked by a stranger, brutally beaten, violently penetrated *has* been raped. And everyone else who hears her story knows she has been raped. Any version of the story that leads to a conclusion that this is something other than rape can be ruled out of bounds. But these are the cases of real rape, about which the law has generally been non-abusive from the victim's point of view and for which harsh punishments

⁴⁵ The project of ethnomethodologists is to uncover these implicit rules and to reveal their force in social interaction. See generally Harold Garfinkel, *Studies in Ethnomethodology* (1967). Social anthropologists, too, engage in this enterprise. See, e.g., Clifford Geertz, *From the Native's Point of View*, in Paul Rabinow and William M. Sullivan, eds., *Interpretive Social Science* 225 (1979).

have been meted out to convicted rapists. With real rapes, there is little difference in perception about what happened. That's what makes them real rapes.

But this is not the case with simple rapes. Where victim and defendant were previously friendly or where the disputed event occurred while they were dating or in another potentially intimate setting, perceptions of the victim and defendant about what really happened may diverge. What seems to be critical in legal judgments is not that the pair knew each other *well*; a woman voluntarily going somewhere with a stranger soon finds herself without a case of real rape when the man later attacks her (pp. 67-68).⁴⁶ What seems to matter more is the opportunity for cue swapping, in which the potential for very different perceptions emerges. Once there is a question that the woman *could* have done something perceived by the man as a come on, the rape becomes less clear-cut in law. Again, this is not to say that the woman did not experience a rape. It's just that in circumstances like this, her definition of what has happened to her may not accord with the interpretations others may have of the same event. From what we know about the different perceptions of women and men, this should not be surprising.

Social psychological research shows that men often tend to read sexual intent into women's behavior when that intent is not there, but women do not seem to do the same with men. Men see women's friendliness as evidence of seductiveness and promiscuity when the women themselves think they're merely being polite.⁴⁷ When given the same cues in a story about a friendship or a dating context, men are more likely than women to see the relationship as potentially sexual and to expect more sexual activity to be forthcoming.⁴⁸ Men seem to sexualize their descriptions of women and of social situations, seeing women as being sexually receptive and as leading men on even with the most meager evidence.⁴⁹

⁴⁶ See, e.g., *Goldberg v. State*, 41 Md.App. 58, 395 A.2d 1213 (Md. Spec. App. 1970), and *People v. Evans*, 85 Misc.2d 1088, 379 N.Y.S.2d 912 (N.Y. Sup. Ct. 1975).

⁴⁷ Antonia Abbey, *Sex Differences in Attributions for Friendly Behavior: Do Males Misperceive Females' Friendliness?*, 42 *J. Personality & Soc. Psych.* 830 (1982).

⁴⁸ M. B. Rytting, *Sex or Intimacy: Male and Female Versions of Heterosexual Relationships* (paper presented at the annual meeting of the Midwestern Psychological Association, Chicago, Ill.) (May 1976), cited in Antonia Abbey and Christian Melby, *The Effects of Nonverbal Cues on Gender Differences in Perceptions of Sexual Intent*, 15 *Sex Roles* 283, 283-84 (1986).

⁴⁹ Abbey and Melby, 15 *Sex Roles* at 295-97. See also Eugene J. Kanin, *Selected Dyadic Aspects of Male Sex Aggression*, 5 *J. Sex Res.* 12 (1969). A useful review of a research on this subject can be found in Sedelle Katz and Mary Ann Mazur, *Understanding the Rape*

And these attitudes are not just harmless pictures of the world, but frames within which men act. A study of a small number of convicted rapists indicates that they were very confused by women's signals in social or sexual situations and that they did not perceive what, to the women, were clear rejections of sexual advances as negative cues.⁵⁰ After examining a group of studies in which men have been asked to report their *likelihood* of raping, Malamuth reports that about 35 percent of men indicated some chance that they would rape a woman if they could be assured that they would not be caught and punished. And those men who reported a higher likelihood of raping women were more accepting of a series of rape myths, such as the views that women want to be raped, that they ask for rape by the way they dress and act, that they are indicating they want to have sex if they invite men to their apartments or engage in kissing or touching of any sort.⁵¹ Studies of the sexual activity of college students conducted periodically since the 1950s indicate that between one-fourth and one-fifth of college women reported that they have been forced into sexual activity⁵² and recent studies show that between one-quarter and one-third of college men admit to using coercive methods to force women into sex.⁵³ Men who engage in such coercive sexual activity are more likely to see women as adversaries and to have a value system that legitimizes aggression, particularly toward women.⁵⁴

The social psychological evidence reveals that, where men and women have a chance to interact and exchange cues about their intentions, men are frequently likely to be wrong about what the woman thinks is going on. Where perceptions diverge in this way, a woman may experience a rape that a man thought was just the normal aggression needed to overcome what he saw was the "no"

Victim 143-47 (1979).

⁵⁰ Jeff Meer, *Rapists' Blind Spot*, 20 *Psych. Today* 14 (1986).

⁵¹ Neil M. Malamuth, *Rape Proclivity Among Males*, 37 *J. Soc. Issues* 138, 140-42 (1981). The questions that indicate acceptance of rape myths are given in Martha R. Burt and Rochelle Semmel Albin, *Rape Myths, Rape Definitions and Probability of Conviction*, 11 *J. Applied Soc. Psych.* 212, 217 (1981).

⁵² Eugene J. Kanin, *Male Aggression in Dating-Courtship Relations*, 63 *Amer. J. Sociology* 197 (1957); Eugene J. Kanin, *An Examination of Sexual Aggression as a Response to Sexual Frustration*, 29 *J. Marriage & Family* 428 (1967); Eugene J. Kanin, *Sexually Aggressive College Males*, 12 *J. College Student Personnel* 107 (1971).

⁵³ Karen Rapaport and Barry R. Burkhart, *Personality and Attitudinal Characteristics of Sexually Coercive College Males*, 93 *J. Abnormal Psych.* 216 (1984); Mary P. Kooss and Cheryl J. Oros, *Sexual Experiences Survey: A Research Instrument Investigating Sexual Aggression and Victimization*, 50 *J. Consulting & Clinical Psych.* 455 (1982).

⁵⁴ Rapaport and Burkhart, 93 *J. Abnormal Psych.* at 216 (cited in note 53).

that meant "yes." The social psychological evidence gives us reason to believe that these perceptual fault lines are deep, enduring, and of enormous consequence in daily life.

What is the law to do? The situation that confronts courts is not just the difficult matter of separating truth from falsehood, determining whether someone in the rape case is lying or whether there is enough evidence to sustain a conviction. Both judges and juries must face the fact that there often will be conflicting true versions of the same event and that what is true for one of the parties may not be true for the other. The only evidence we have consists of perceptions, whether they are the reports of the victim and defendant (filtered through the perceptions of judge and jury) or the ways judges' and juries' first-hand perceptions lead them to interpret the physical evidence and testimony available.⁵⁵ There is no such thing as a value-neutral fact.⁵⁶ All facts are made meaningful and "real" against a backdrop of expectations and interpretive conventions.⁵⁷ Given the current state of divergent perceptions of men and women, the more troubling question for law is not the question of truth and falsehood, but instead the question of *which* true version of a particular story should be adopted as the official version of what happened.

Here, the obvious solutions of farming factual problems out to juries or putting more women on the bench are unlikely to settle the question satisfactorily, but not for the obvious reason. One

⁵⁵ Jerome Frank noted that evidence always comes doubly refracted—once through the perceptions of witnesses and then again through the perceptions of judges and juries. The recognition that judges and juries themselves must see through their own perceptual filters is one of Frank's major insights. But Frank concluded from this observation that "we have subjectivity piled on subjectivity." Frank, *Courts on Trial* at 22 (cited in note 37). The fact that perceptions occur in people's minds does not mean that they are independent of social influence, that they have no correspondence with the world or that they are outside the range of normative evaluation. The subjectiveness of perceptions for Frank meant that they could not be said to be true or that any one was better than any other. And he certainly did not think that there was any rhyme or reason to them. That was why he believed that the outcome of lawsuits could never be known in advance. Jerome Frank, *Law and the Modern Mind* 183-99 (1930).

⁵⁶ There is a large and varied literature on this issue, and one might start in on it by reading Goodman, *Ways of Worldmaking* (cited in note 33); Norwood Hanson, *Patterns of Discovery* (1958); and for the more adventurous, Hans-George Gadamer, *Truth and Method* (1975) and Ludwig Wittgenstein, *Philosophical Investigations* (1953).

⁵⁷ In literary theory, the problem of literal meaning reveals the impossibility of escaping from conventions. Stanley Fish's analysis of a sign that reads "Private Members Only" shows just how humorous refusing to see the contextually given meaning can be. Stanley Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes without Saying and Other Special Cases*, in *Is There a Text in This Class?* 268, 275-77 (1980).

might think that with the evidence presented here, it will be impossible for juries composed of men and women ever to agree on anything or that female judges necessarily will reach different conclusions from male judges, destroying whatever coherence exists in law. But we know from experience, at least with juries, that this is not so.⁵⁸ In addition, surveys of the general public indicate that men and women are *not* significantly different in many of their attitudes toward the appropriate legal standards for judging rape. When asked about whether the degree of a woman's resistance should be the major factor determining whether a rape has occurred, whether a delay in reporting means a rape probably didn't happen, and whether convicted rapists should get long sentences, men and women reveal almost identical attitudes.⁵⁹ It is *not* impossible or even difficult to get agreement about the relevant legal standards against which particular cases should be judged and there seems to be substantial agreement about the correct legal result in particular cases. The perceptual fault lines between women and men do not seem to carry over into the context of law.

And that is exactly the problem. Women and men *do* have very different perceptions of experience, but in the context of law one set of perceptions is hidden. Michel Foucault speaks of subjugated knowledges to describe such buried views.⁶⁰ What remains—the perceptions acknowledged, recognized, *seen* in law—is the socially constructed “objective” point of view against which both men's and women's actions are judged by both men and

⁵⁸ The famous American jury study by Harry Kalven Jr. and Hans Zeisel found that only 3 of the 106 rape cases in their study resulted in a hung jury (although we do not know whether these panels were mixed-sex juries). Harry Kalven Jr. and Hans Zeisel, *The American Jury* 251 (1966). In a more recent study of jurors in rape trials, no sex differences were found in the likelihood of voting for conviction. Hubert S. Feild and Leigh B. Bienen, *Jurors and Rape* 121 (1980).

⁵⁹ Feild and Bienen, *Jurors and Rape* at 50-51 (cited in note 58). Other questions, such as whether it would do some women good to be raped or whether a woman provokes a rapist by her appearance, *do* provoke different responses from women and men, but it is significant that in most of the questions where the subject is the correct *legal* standard there is substantial agreement.

⁶⁰ “By subjugated knowledges I mean two things: on the one hand, I am referring to the historical contents that have been buried and disguised in a functionalist coherence or formal systemization. . . . On the other hand, I believe that by subjugated knowledges one should understand something else . . . namely, a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naive knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity.” Michel Foucault, *Two Lectures: Selected Interviews and Other Writings, 1972-77*, in *Power/Knowledge* 78, 81-82. (1980).

women.⁶¹ That point of view *is* the law.⁶² But it is not the point of view of all.⁶³

IV. ENCOURAGING RE-VISION

What is to be done? Estrich identifies a particular point of view that is embedded in legal doctrine and legal fact finding and I have shown that this point of view does not reflect women's perceptions and experiences in the world outside of the law. The way simple rapes are dismissed in law, from police through to appellate courts, sends a message to women that their experiences are not real, that their perceptions are not well-founded enough to enter the law. But the point of view the law embodies is not neutral. As Estrich writes:

We live in a time of changing sexual mores, and we are likely to for some time to come. In such times the law can bind us to the past or help push us into the future. It can continue to enforce traditional views of male aggressiveness, and female passivity, continue to uphold the "no means yes" philosophy as reasonable, continue to exclude the simple rape from its understanding of force and coercion and nonconsent—until

⁶¹ One way women and men try to reconcile their views that particular actions are inappropriate with their view that the law ought to incorporate an "objective" point of view is by distinguishing between moral and legal wrongs, with the former taking into account the woman's definition of the situation and the latter seeing the situation "technically" or "objectively." R. Lance Shotland and Lynne Goodstein, *Just Because She Doesn't Want To Doesn't Mean It's Rape: An Experimentally Based Causal Model of the Perception of Rape in a Dating Situation*, 46 Soc. Psych. Quart. 220 (1983). Another way women cope is by segregating thinking "like a woman" from thinking "like a lawyer" or thinking like some other representative of a particular style of thinking. Catharine A. MacKinnon, *On Exceptionality: Women as Women in Law*, in *Feminism Unmodified: Discourses on Life and Law* 70-77 (1987). See also Carol Gilligan, *In a Different Voice: The Psychological Theory and Women's Development* (1982).

⁶² When Catharine MacKinnon writes of the point of view that "is the standard for point-of-viewlessness," she reveals this process of subjugation at work throughout the law. Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 Signs: J. Women Culture & Soc'y 635, 638 (1983). The attack on the standards of objectivity in law is a significant part of the agenda of feminist jurisprudence. See Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L. J. 1373, 1376-80 (1986).

⁶³ We also see signs that women are trying to escape from this institutional denial of a female point of view. Estrich begins her book with an account of her own rape (pp. 1-3). MacKinnon writes of the difficulty women have being women in law. MacKinnon, *Feminism Unmodified* at 70 (cited in note 61). And I worried long and hard about whether to write in this review about my own experience of being sexually assaulted twice, in both cases fighting off my attackers by responding to physical force with physical force. If writing "objectively" means writing without experience on this subject, then none of us—male or female—is "objective."

change overwhelms us. That is not a neutral course. In taking it, the law . . . not only reflects the views of (a part of) society, but legitimates and reinforces those views.

(p. 101).

Feminists who led the drives to change the wording of rape statutes in the 1970s and early 1980s have completed only part of the task of altering the operation of rape law. They have *re-formed* the statutes by changing the shape of the legal standards, but that is not enough. Law does not consist solely of rules⁶⁴ or even of rules and principles.⁶⁵ Law consists, as I have argued, of the mutual construction of facts and rules. Changing the legal rules without also changing how courts see the facts is likely to produce only a minor change of legal course. What is needed still is the *re-vision* of rape, learning to *see differently* in law how men and women communicate and interact.

This re-vision is at the root of what Estrich proposes. Significantly, she proposes changes in definitions of the words used in rape statutes, changes that alter the facts in the world that the words point to:

"Consent" should be defined so that no means no. The "force" or "coercion" that negates consent ought to be defined to include extortionate threats and misrepresentations of material fact. As for intent, unreasonableness as to consent, understood to mean ignoring a woman's words, should be sufficient for liability. Reasonable men should be held to know that no means no; and unreasonable mistakes, no matter how honestly claimed, should not exculpate. Thus, the threshold of liability—whether phrased in terms of "consent," "force," and "coercion" or some combination of the three—should be understood to include at least those nontraditional rapes where the woman *says* no or submits only in response to lies or threats which would be prohibited were money sought instead.

(pp. 102-03) (emphasis in original). These changes in definition bring women's subjugated knowledge into the interpretation of law and they do so within the purview of legal standards already used in rape and other criminal cases. Estrich's re-vision indicates that it is women's saying "no," not men's interpretation of "no," that

⁶⁴ H. L. A. Hart, *The Concept of Law* (1961).

⁶⁵ Ronald Dworkin, *The Model of Rules I*, in *Taking Rights Seriously* 14 (1977).

ought to count as nonconsent in the law. In this new view, "Simple rape is real rape" (p. 104).

Some might complain that Estrich's standards would catch in a far-flung net a great many men who were not real rapists. Implicit in that criticism is the traditional view that a man shouldn't be punished for eagerly pushing an ambiguous social situation too far. Estrich is not proposing that men guess what is in women's minds and magically stop a steady progression of advances just when the women would have them stop. Estrich wants women to take responsibility for saying no when they mean no, and to say it forcefully to have it count. She expects only that men should be able to understand and respect the views that women clearly express (p. 98).

This is not to say that men now generally understand and respect women's stated views. But the law need not adopt the version of facts that reflects current, ordinary social practice. As the practitioners of law and economics remind us frequently, law is not necessarily a codification of social practice, it is an incentive system. And the existence of legal rules serves to make the approved behaviors more likely, the disapproved behaviors less likely, other things being equal.⁶⁶ Estrich hopes to create incentives for men to "open their eyes and use their heads before engaging in sex" (p. 98). By making women's perceptions visible in law, she hopes to reduce the incidence of simple rapes.

Estrich's proposals are also similar to those of the law and economics movement in their sweeping restatement of relevant facts. Bruce Ackerman has pointed out that one of the major contributions of law and economics is its broadening of the scope of relevant facts in legal disputes to include a wider field of vision (not just the who-did-what-to-whom-at-the-moment-of-trouble sorts of facts, but the sorts of facts that cover broader social practices of which a particular lawsuit represents one instance).⁶⁷ Estrich's revision of rape law does the same thing; it attempts to restructure social practice through restructuring the kinds of facts that courts notice.

Real Rape is a powerful book. It reveals and empowers women's experiences in law. If it succeeds in creating a drive for

⁶⁶ For a general statement, see Richard A. Posner, *The Economic Analysis of Law* at 229-33 (3d ed. 1986). For an analysis more specifically focused on the criminal law, see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

⁶⁷ Bruce A. Ackerman, *Reconstructing American Law* 46-71 (1984).

the re-vision of rape law, it may enable women to get out from under the "unfair struggle with the forces of perception."⁶⁸

⁶⁸ Adrienne Rich, *A Vision*, in *A Wild Patience Has Taken Me This Far* 50 (1981).